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In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 215

BERNARD SHAPIRO, COMMISSIONER OF WELFARE,
STATE OF CONNECTICUT,
Appellant,
against
EDNA SOLMAN, ET ALS.,
Appellees.

On Appeal From The United States District Court
For the District of Connecticut

MOTION TO AFFIRM

DAVID M. LESSER
605 Congress Avenue
New Haven, Conn.
THOMAS JAY SOLOMON
35 Field Street
Waterbury, Conn.
WILLIAM H. CLENDENEN, JR.
795 Grand Avenue
New Haven, Conn.

FRANCIS X. DINEEN
169 Church Street
New Haven, Conn.
Attorneys for Appellees.

THE MACK CO., NORTH HAVEN, CONN.

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In the

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OCTOBER TERM, 1968

No. 1501

BERNARD SHAPIRO, COMMISSIONER OF WELFARE, STATE OF CONNECTICUT,
Appellant,
against
EDNA SOLMAN, ET ALS.,
Appellees.

On Appeal From The United States District Court For the District of Connecticut

MOTION TO AFFIRM

Appellees move the Court to affirm the judgment sought to be reviewed on the appeal, because it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Whether Subchapter IV of the Social Security Act, 42 U.S.C. §§601-610, compels the invalidation of Section 17-87(a) of the Connecticut General Statutes, which requires that the income and ability of a stepparent be considered as available for the support of minor stepchildren residing with him?

2. Whether the issues presented by this appeal have already been determined in *King* v. *Smith*, 392 U.S. 309 (1968)?

STATEMENT OF THE CASE

As the stipulations recite, the appellant sought to deny, terminate or reduce assistance to the minor appellees under Connecticut's program of Aid to Families With Dependent Children (AFDC), solely because they resided with an employed stepparent who was not legally obligated to support them (R. Doc. Nos. 55, 56, 57, 58). Although each stepparent was unwilling or unable to support the minor appellees, appellant nevertheless refused to grant them the full assistance award to which they were otherwise entitled (*id.*). In several instances, a stepfather provided little or no support for his stepchildren, who were thus without income to meet their basic needs (R. Doc. No. 56 at 1, 3). Most of the minor appellees received no aid from their natural fathers, who had abandoned all responsibilities toward them, or from any other source (R. Doc. Nos. 56 at 1-3, 57 at 1).

But for the fact that they resided with their employed stepparents, who were not required by law to support them, the minor appellees were eligible in every respect for AFDC assistance. As authority for denying them aid, appellant invoked Section 17-87(a) of the Connecticut General Statutes, which requires that, in determining need for AFDC:

> ". . . the ability and income of a stepparent shall be considered as available for the support of . . . his minor stepchild or stepchildren residing with him . . ."

(R. Doc. Nos. 55, 56, 57, 58).

In ascertaining the amount, if any, of a stepchild's AFDC award, the appellant relied upon 1 Conn. State Welfare Manual §345.3:

> "Eligibility in regard to the need requirement exists only if the stepparent's income together with other available income is insufficient to meet total family need determined

on Department standards with additional consideration as specified for exceptional expenses."

The income of a stepparent of moderate means may barely be sufficient to meet total family need on public assistance standards (R. Doc. No. 61), even when consideration is given to his expenses. To support his stepchildren, a stepparent in precarious financial circumstances must choose to support himself, his spouse and any children of the marriage at a level equal to or only slightly above AFDC assistance levels.[1] The

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[1] In his Jurisdictional Statement at 4 ¶6, appellant asserts that children in a family of six could receive AFDC benefits if their stepfather earned less than $422.55 monthly (R. Doc. No. 59). In fact the stepchildren would be eligible only for the difference between his available income and $422.55, the income required to meet total family need on AFDC assistance standards (R. Doc. No. 59 assumes rental costs of $125.00). AFDC is awarded in an amount "*not to exceed the needs* of the eligible children as determined on Public Assistance standards." 1 Conn. State Welfare Manual §345.3 at 2. Where the stepparent's income is insufficient to support even his spouse at public assistance standards, appellant may additionally grant aid to her which will raise her standard of living to the AFDC level. *Id.* at 3.

Appellant contends, Jurisdictional Statement at 4 ¶7, that a stepparent could earn $800 monthly without rendering his stepchildren ineligible for AFDC assistance. As the stipulations illustrate, in the one instance where a stepparent earned a substantial salary his stepchildren were ineligible for AFDC assistance (R. Doc. No. 56 at 3). In concluding that children whose hypothetical stepparent earned $800 monthly might be nonetheless eligible, appellant gave consideration to expenses for which an AFDC recipient and legally liable relatives are also credited. 1 Conn. State Welfare Manual §§332.3 at 2, 344.3, 345.2 (R. Doc. No. 60). A far more typical situation is presented by the Solman family, where the minor child's AFDC award was terminated because his stepfather earned between $75.00 and $79.00 weekly (R. Doc. Nos. 2 at 5, 56 at 1). Similarly, the stepchildren of Mr. Ramos were faced with a reduced AFDC award because his net weekly income was $75.05 (R. Doc. No. 56 at 3-4).

stepparent is not granted AFDC assistance unless he is incapacitated or unemployed (R. Doc. No. 54 at 19-20). 1 Conn. State Welfare Manual §345.3 at 3.

The court below invalidated the Connecticut Statute and regulation, on the ground of their inconsistency with Subchapter IV of the Social Security Act, 42 U.S.C. §§601-610. The stepparent's

> "income or his resources may be taken into consideration only if they are actually available for the use of the children. To permit the Welfare Commissioner to predict that every stepfather will support his minor stepchildren, and even more demandingly, to conclusively presume that he will do so would also be at odds with the federal regulation. Where the support of a child is at stake, the only relevant circumstance which may relieve the state of its duty to provide AFDC support for a needy child is whether its stepfather did in fact support the child."
>
> *Solman* v. *Shapiro*, F. Supp. (D.Conn., 1969), Appellant's Jurisdictional Statement 14, 22.

Appellees seek affirmance of the court's opinion.

ARGUMENT

1. The Decision of This Court In King v. Smith, 392 U.S. 309 (1968), Requires That the Stepparent Provisions of Section 17-87(a) of the Connecticut General Statutes Be Invalidated.

In *King* v. *Smith*, 392 U.S. 309 (1968), this Court barred Alabama from denying AFDC assistance to needy children solely because of the presence in their home of a person not legally obligated to support them. *Id.* at 319 n.16, 327, 329-

330, 333 (1968). Additionally this Court noted that stepparents in Alabama had no such obligation. *Id.* at 316 n.10. Similarly, a Connecticut stepparent has no legal duty to support his stepchildren. *Solman* v. *Shapiro*, Appellant's Jurisdictional Statement 14, 18.

Like Alabama's invalidated regulation, Section 17-87(a) renders irrelevant any inquiry into the actual contributions of the stepparent. *Solman* v. *Shapiro*, at 16 n.5. Regardless of need, appellant will not provide full AFDC assistance to children residing with a stepparent whose income is assumed to be available for their support. 1 Conn. State Welfare Manual, §345.3. Connecticut thereby seeks to deprive needy children of AFDC on the ground that they simply reside with an employed stepparent who, like Alabama's "substitute father", cannot be compelled to support them.

Appellant contends that a stepparent's support of his stepchildren is a time-honored practice. Jurisdictional Statement at 8. Appellant, however, cites no authority for this proposition. Subsequent to the decision of the court below, the Connecticut General Assembly refused to pass an amendment which would have created such a support obligation. Amendment rejected June 3, 1969, by House of Representatives. New Haven Journal Courier, June 4, 1969, at 1, col. 4 (reprinted in Appendix 3a).

Appellant further asserts that 75% of AFDC mothers remarry shortly after their divorces. Jurisdictional Statement at 4 #8. Appellant's witness actually testified that of those women who did leave the AFDC rolls, closer to 25% gave remarriage as the "immediate" reason (R. Doc. No. 54 at 11-12). Depriving children of AFDC assistance because a stepparent is in the home, however, can place serious strains on a marriage (R. Doc. Nos. 2, 5, 8), which may result in the dissolution of the family. McRae et al., The Effects of Discontinuance in 1963 on ADC Families with Stepfathers (1965) (Master's Thesis on file at University of Connecticut School of Social Work).

This Court's examination of the legislative history of the Social Security Act reveals that its AFDC provisions were enacted to assist this very class of children whom Connecticut seeks to hold ineligible for the full grant of assistance to which they are entitled. Congress, in passing the Social Security Act, "was deeply concerned with the dire straits in which all needy children in the Nation then found themselves." *King* v. *Smith*, at 327. The AFDC program "was designed to protect . . . 'one clearly distinguishable group of children.'" *Id.* at 328. More specifically,

> "AFDC was intended to provide economic security for children whom Congress could not reasonably expect would be provided for by simply securing employment for family breadwinners. We think it apparent that *neither Congress nor any reasonable person would believe that providing employment for some man who is under no legal duty to support a child would in any way provide meaningful economic security for that child.*" (emphasis supplied)
>
> *Id.* at 329-330.

Congress "expected" that only an employed person "who was legally obligated to support his children", and who resided with his family, would in fact provide that support. *Id.* at 329. The very purpose of the AFDC program, therefore, controverts the expectation or assumption that needy children possess a source of support from one who lacks the legal obligation to provide that support.

Alabama had disqualified needy children through an erroneous interpretation of 42 U.S.C. §606(a) (1964 ed., Supp. III):

> "Congress must have meant by the term 'parent' an individual who owed to the child a state-imposed legal duty of support."
>
> *King* v. *Smith*, at 329.

By considering income as available to needy children when it may in fact be unavailable, Connecticut seeks to disqualify otherwise eligible children from AFDC in violation of Section 602(a) (7) of Title 42 of the United States Code. For this Court recognized that Section 602(a) (7) requires a state, in determining need, to consider only income and resources which are *actually* available to the applicant on a regular basis. *King* v. *Smith*, at 319 n.16. Since a state must exclude "from consideration resources which are merely assumed to be available to the needy individual," *id.*, Section 17-87(a) of the Connecticut General Statutes impermissibly denies AFDC to dependent children. *King* v. *Smith* therefore invalidates any attempt by Connecticut to disqualify needy children from AFDC merely because of the presence in their home of a person not legally obligated to support them.

This Court's decision in *King* v. *Smith* mandates the invalidation of the stepparent provisions of Section 17-87(a) of the Connecticut General Statutes. The appellees' Motion to Affirm should therefore be granted.

II. In King v. Smith, 392 U.S. 309 (1968), This Court Expressly Approved Regulations of the Department of Health, Education and Welfare Which Invalidate the Stepparent Provisions of Section 17-87(a) of the Connecticut General Statutes.

In *King* v. *Smith*, 392 U.S. 309, 317 (1968), the Supreme Court held that a state AFDC plan must comply "with rules and regulations promulgated by HEW." Prior to the decision in *King* v. *Smith*, HEW had issued regulations which prohibited appellant's attribution of a stepparent's income to needy children regardless of its actual availability. These regulations were examined and expressly approved in *King* v. *Smith*, at 319 n.16.

The HEW regulations approved by this Court in *King* v. *Smith* were precursors of the regulation relied upon below. 45 C.F.R. §203.1, 33 Fed. Reg. 11290 (1968). Those portions of the HEW regulation upon which the opinion of the court below was based, Appellant's Jurisdictional Statement at 16-17, simply reenact earlier requirements already approved by this Court. *King* v. *Smith*, at 319 n.16. Since a Connecticut stepparent has no legal obligation whatsoever to support his stepchildren, his income may not "be considered available for children in the household in absence of proof of actual contributions." 45 C.F.R. §203.1(b), 33 Fed. Reg. 11290 (1968). Because Section 17-87(a) of the Connecticut General Statutes clearly conflicts with HEW regulations already adjudicated as valid, the appellees' Motion to Affirm should be granted.

III. The 1968 Amendment to 42 U.S.C. §602(a)(7) Does Not Authorize a State to Assume That a Stepparent's Income Is Available to Stepchildren Residing in the Home.

Section 202 of the 1968 Amendments to the Social Security Act, Pub. L. No. 90-248, §202 (1968), does not authorize the appellant to assume the availability of a stepparent's income to stepchildren whom he is not legally obligated to support. The primary purpose of this amendment is to create an earnings exemption [42 U.S.C. §602(a)(8) (1964 ed., Supp. III)] for recipients and certain "essential persons" [42 U.S.C. §602(a)(7) (1964 ed., Supp. III)]. S.R. 744, 90th Cong., 1st Sess. at 155, 158 (1967); H.R. Rep. No. 544, 90th Cong., 1st Sess. at 174 (1967).

Section 202 amends 42 U.S.C. §602(a)(7) as follows:

> "Except as may otherwise be provided in clause 8, [the State plan shall] provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, *or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid*, as well as any expenses reasonably attributable to the earning of any such income . . ." (emphasis supplied)

As the court below explained in great detail, an "essential person" is ineligible in his own right for public assistance. If, however, he is essential to the well-being of a recipient of public assistance, his needs may, at the option of the recipient, be included in the assistance budget. The court below recognized that Section 202 comfortably coexists with HEW's rule, approved by this Court, against income presumptions. *Solman*

v. *Shapiro*, at 19-22. The court further noted that a Connecticut stepparent is not an "essential person." *Id.* In computing the amount of the AFDC budget, the Connecticut State Welfare Department does not meet the needs of a stepparent. 1 Conn. State Welfare Manual §345.3, at 2-3. If the stepparent is unemployed or incapacitated he is eligible in his own right for assistance, and is not an "essential person." *Id.*

Although *King* v. *Smith* did not explicitly refer to Section 202, this Court considered related Sections of the 1968 Amendments in some detail. *King* v. *Smith*, at 324-326, 331-333. Despite its awareness of the 1968 Amendments, this Court held that HEW's interpretation of Section 602(a) (7) of Title 42 "properly excludes from consideration resources which are merely assumed to be available to the needy individual." *King* v. *Smith*, at 319 n.16. Appellees cannot credit the notion that *King* v. *Smith* was undercut at the moment of its publication by an Amendment of which this Court was doubtless aware. Beyond question, Section 202 of the 1968 Amendments meshes perfectly with this Court's rule against income presumptions.

IV. The Cases Upon Which Appellant Relies Are Inapposite.

Appellant relies heavily in his Jurisdictional Statement upon the case of *Tartaglio* v. *Department of Institutions and Agencies, Division of Public Welfare*, 102 N.J. Super. 592, 246 A.2d 483 (1968), *cert. denied*, 89 S. Ct. 1594 (1969). This reliance is misplaced, for the denial of certiorari hardly indicates this Court's opinion as to the merits of a controversy. *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-919 (1950). Moreover, neither the HEW regulation adopted after *King* v. *Smith*, 45 C.F.R. §203.1, 33 Fed. Reg. 11290 (1968), nor the

HEW requirements approved by this Court, 392 U.S. at 319 n.16, was referred to in the *Tartaglio* opinion or introduced at the trial level.[3] The *Tartaglio* case cannot aid the appellant.

Appellant further relies upon the case of *Lewis* v. *Stark*, F. Supp. (N.D. Cal., 1968), CCH Poverty Law Reporter 10,543. The *Lewis* decision, however, raises issues that are not involved in this case. In California a stepfather or "man assuming the role of spouse" (MARS) is under a legal obligation to support children in the home if they would otherwise "be needy children eligible for aid . . ." Cal. Welf. & Inst. Code §11351. This duty of support, as noted by plaintiffs in *Lewis*, is of a wholly different and lesser degree than the duty of a natural parent toward his children. California assumes that the resources of such a person are available for the support of children in the home. The California practice is inconsistent with the requiurement of HEW. 45 C.F.R. §203.1, 33 Fed. Reg. 11290 (1968). The district court ruled invalid HEW's requirement that the support liability be of general applicability, *Lewis* v. *Stark*, at 10,546-7, and upheld the California statute, stating:

> "If the state assumed the availability of resources whose application to the needs of the family were not required by law, that would present a different case."
>
> *Id.* at 10,549.

In Connecticut, of course, a stepparent has no legal obligation at all to support his stepchildren. While appellees here agree with plaintiffs in *Lewis*, that the availability of a stepparent's income ought to be assumed only where his support

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[3] The issue of whether a stepparent's income can be assumed as available for his stepchildren is now being litigated in New Jersey. *Anderson* v. *McCorkle*, Civ. Act. No. 1386-68 (D.C. N.J.).

obligation is equivalent to that of a natural parent, the validity of this HEW requirement is not at issue here. The appellant's reliance on *Lewis* is therefore misplaced.

V. The Court Below Did Not Award Retroactive Damages to Appellees, But Properly Remanded the Question of Damages to the Connecticut State Welfare Department.

The court below awarded no damages to appellees, but rather remanded their prayer for damages to the Connecticut Department of Welfare for determination in light of its own regulations and those of HEW. 1 Conn. State Welfare Manual §6300(7); IV Handbook of Public Assistance Admin. §6200(k).[4] Therefore, any award of retroactive benefits will not be made by the district court, but rather pursuant to the decision of an agency of the State. *Solman* v. *Shapiro*, at 23-24.

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[4] The court's procedure was proper, particularly since AFDC benefits are statutory entitlements. *Smith* v. *King*, 277 F. Supp. 31, 38 (M.D. Ala., 1967), *aff'd*, *King* v. *Smith*, 392 U.S. 309 (1968); *Thompson* v. *Shapiro*, 270 F. Supp. 331 (D.Conn., 1967), *aff'd*, *Shapiro* v. *Thompson*, 89 S. Ct. 1322 (1969); *Board of Social Welfare* v. *County of Los Angeles*, 27 Cal. 2d 81, 162 P.2d 630 (1945).

CONCLUSION

Appellees' Motion to Affirm should be granted.

Respectfully submitted,

DAVID M. LESSER
New Haven Legal Assistance
Association, Inc.
605 Congress Avenue
New Haven, Connecticut

THOMAS JAY SOLOMON
Waterbury Legal Aid & Reference
Service, Inc.
35 Field Street
Waterbury, Connecticut

WILLIAM H. CLENDENEN, JR.
New Haven Legal Assistance
Association, Inc.
795 Grand Avenue
New Haven, Connecticut

FRANCIS X. DINEEN
New Haven Legal Assistance
Association, Inc.
169 Church Street
New Haven, Connecticut

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New Haven Journal Courier, June 4, 1969, at 1, col. 4.

WIDE CURBS ON WELFARE APPROVED

BY GERALD MCKIERNAN
State Capitol Reporter

HARTFORD — All that remains for an official closing of the state Welfare Department's budget is the signature of Gov. John N. Dempsey.

The state House of Representatives gave final legislative approval Tuesday night to what has been termed the omnibus welfare bill which:

— Closes the Welfare Department budget and ends no-ceiling spending;

— Eliminates the Cost of Living Commission and assigns that group's task to the welfare commissioner who will be required to report to the legislature's Interim Welfare Committee at six-month intervals;

— Lowers from 21 to 19 the top age of eligibility for Aid to Dependent Children (ADC) programs;

— Sets higher limits on how much a family on welfare can earn in the course of a year — family of two, $3,200; three, $3,800; and four, $4,400; and

— Creates an executive committee of five to nine members charged with implementing the recommendations of the A.D. Little Co. which recently studied the Welfare Department.

On the way toward passage of the bill, the House defeated a Republican amendment (requiring stepfathers, if they are fi-

(See WELFARE Page 19)

nancially able, to contribute to the support of welfare families) and in effect, squelched three amendments which never were offered by Rep. Robert Oliver, D-New Haven.

When the time came for the lower chamber to consider the New Haven Democrat's proposals — aimed at maintaining the unemployed parents' program and reevaluating the federal Title 19 regarding Medicaid — the sophomore legislator was not in his seat.

Majority Leader Carl Ajello asked the speaker, William Ratchford of Danbury, to hold the amendments over until Oliver returned.

Ratchford asked the House if there was any objection to this move and hearing none, asked if there were further comments on the bill. Dr. Morris Cohen, D-Bloomfield, the House chairman of the Public Welfare and Humane Institutions Committee, got to his feet but sat down when met by a large chorus of "sit down Doc."

Ratchford then asked if there was further comment and in the silence asked for a vote on the bill — it passed a voice vote with no dissent.

Moments later, Oliver returned to the hall and was met by Ajello in the well of the House. The New Havener repeated, "It isn't fair," but the majority leader merely shrugged his shoulders.

The GOP amendment I, introduced by Rep. Arline Ryan, R-Branford, was hotly debated and opposed by Rep. Bruce Morris, D-New Haven, who asked that the state be required to go out and find the original father, "the one who made them" (the dependent children).

Some Democrats asked what would happen if the Republican amendment was adopted and were informed by Ratchford that a disagreeing action (with the Senate which had already approved the bill) would occur and a committee on conference would have to be formed.

Rep. John Prete, D-West Haven, doubted the wisdom of such a move and noted, "I don't know how many times we can try the Senate." in an obvious reference to the number of times the two Democratic chambers have disagreed this legislative year.

With Republican deflections and heavy Democratic support — the amendment lost on a roll call vote, 103-55.

In essence, the bill would not completely close the Welfare Department's budget in that the commissioner would still be allowed to go to the Finance Advisory Committee for needed funds.

Considering the bill, however, he could expect rough sledding at such a session.

(emphasis added)